IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 255 OF 1986

1. Shri Hardasmal Narumal Devnani
(deceased by his legal representatives)
A) Sita H.Devnani, since deceased
by her heirs
A(1) Shri Lakhimal H.Deonani.
A(2) Shri Gopichand J.Deonani
B) Shri Lakhimal H.Devnani
Age: Adult, Occ.: Business.
C) Shri Gopichand J.Devnani,
Age: Adult, Occ.: Business.

2. Shri Lakhimal H.Devnani,
Age: Adult, Occ.: Business.
3. Shri Gopichand J.Devnani,
Age: Adult, Occ.: Business.
All residing at Bklock No.9/10,
Pimpri Colony, Pune 411 017. ... Appellants
(Org.Defendants.)

Versus.

Shri Thakurdas N.Goklani (deceased
by his legal representatives)
1) Shri Kishan Thakurdas Goklani,
Age: Adult, Occ.: usiness,
residing at Raju Society,
Flat No.34, Ulhasnagar-3.

2) Shri Mohan Thakurdas Goklani,
Age: Adult, Occ.: Service,
residing at 14/9, PWD Quarters,
Pimpri Colony, Pune 411 017.

3) Shri Murli Thakurdas Goklani,
Age: Adult, Occ.: Service,
residing at 14/9, PWD Quarters,
Pimpri Colony, Pune 411 017.

4) Miss Suverna Thakurdas Goklani,
Age: Adult, Occ.: Service,
residing at 14/10, PWD Quarters,
Pimpri Colony, Pune 411 017.

5) Mrs.Poonam Kishanchand Chandiramani,
Age: Adult, Occ.: Household work,
Addres: C/o.Asha Brothers,
H/3/1A, Avenue Calcutta-29.

6) Mrs.Maina Nandlal Perwani,
Age: Adult, Occ.: Household work,
residing at Shoop Bhavan,
Civil Lines, raipur (M.P.)

7) Mrs.Radha Ghanshyamdas Chanchakai,
Age: Adult, Occ.: Household work,
residing at Patel Niwas, Kasba,
Baramati, Dist. Pune. ... Respondents.
(Org.Plaintiffs)

Shri J.C.Satpute with Shri D.S.Verma for the Appellants.

Shri Avinash Shivade for the Respondents.

CORAM : ABHAY S. OKA, J.

DATED : 10th August, 2004.

ORAL JUDGMENT.

1. On 23rd June 1987, this Court admitted the Second Appeal. This Court observed that the Second Appeal has been admitted as companion Second Appeal No.136 of 1987 was admitted by this Court on the same day. While admitting the companion Second Appeal No.136 of 1987, this Court observed that points Nos.7, 8, 10, 12 and 14 are the substantial questions of law. However, while admitting this Appeal, no substantial questions of law have been specifically framed. Therefore, by order dated 23rd June 2004 by exercising powers under the proviso to sub-section (5) of section 100 of the Code of Civil Procedure, 1908, I have framed two substantial questions of law which read thus;

(i) Whether a Civil Suit was maintainable for challenging an Award made in Arbitration proceedings under the Arbitration Act, 1940 ?

(ii) Whether the jurisdiction of the Civil Court to entertain such a suit was ousted by necessary implication as the the said Act of 1940 provides for remedy of filing an application for challenging the Award ?

I have heard the learned Counsel appearing for the parties on the said substantial questions of law. I have also perused the written submissions filed by both the parties.

2. Before referring to the submissions made by the learned Counsel appearing for the parties, it will be necessary to refer to the facts of the case in brief. The Second Appeal is by the original Defendants. The Respondents are the original Plaintiffs. Civil Suit No.924 of 1972 was filed by the Respondents against the Appellants for true and full accounts of the partnership business of M/s. Cinema Deluxe. In the alternative a prayer for dissolution of the partnership was made. The

case made out by the Respondent was that the said partnership was formed under a deed of partnership dated 9th December 1966. However, the business of the partnership commenced since 1st April 1966. The business of partnership was of exhibition of cinema films. The case is that the Respondent/original Plaintiff Thakurdas had 36% share in the profit and loss of the firm and the Appellants Nos.1 to 3 were having 9% and 30% and 25% shares respectively in the profit and loss of the partnership firm. A case is made out in the plaint that though the plot of land bearing CTS No.496 at Pimpri was purchased by partnership in the name of the Appellant No.1, the said plot was the asset of the partnership. It is stated in the plaint that on the suggestion made by the Appellants, the dispute between he parties was referred to arbitration of Shri H.H.Sachwani and Shri N.V.Bhatia. The case of the Respondents is that the Arbitrators were biased against the Respondents and Award was made by the Arbitrators on 16th February 1971 without affording any opportunity to the Respondents of being heard. It is stated that the said Award has not been filed in the Court and the decree in terms of the award is not obtained. A specific contention is raised in the plaint that the said award is null and void and does not confer any right on the Appellants. The original

Respondent/Plaintiff stated that the Appellants paid a sum of Rs.12,000/- to him purporting to represent the share of the Respondent upto 4th February 1971 and obtained a receipt from him. A contention is raised in the plaint that there were many entries fraudulently made in the accounts of the said firm. By notice dated 13th June 1972 the Respondents dissolved the partnership and the suit was filed.

3. The Appellants contested the suit by filing their Written Statement. One of the contentions raised was that the partnership was not at will and it was for a period of 5 years. It is stated in the written statement that Plot No.496 at Pimpri was purchased by the Appellant No.1 and it is Appellant No.1 who has constructed the cinema theatre on the said plot. There was an agreement between the Appellant No.1 and his brothers and under that agreement, the Appellant No.1 and his brothers held interest in the said theatre. It is contended in the written statement that the original Respondent being a servant of the Appellant No.1 had access to the correspondence made by the Appellant No.1 and the original Respondent have taken advantage of the confidence reposed by the Appellant No.1 in him. It is specifically contended by the Appellant that the award was made by the Arbitrators after giving full

opportunity to both the parties of being heard and the original Respondent acted upon the award made by the Arbitrators by accepting a sum of Rs.12,000/- from the Appellants and therefore, the said original Respondent was estopped from challenging the award. A contention was raised that the Respondent cannot challenge the award unless he deposit and/or repay the sum of Rs.12,000/- to the Appellants. It is submitted that the Respondent Thakurdas has received the sum of Rs.12,000/- in full and final settlement of his claim on the basis of the Award and therefore, he is not entitled to maintain a civil suit.

4. The learned trial Judge partly decreed the suit. The learned trial Judge passed a decree of declaration that the partnership firm shall be deemed to have been dissolved with effect from 20th June 1972 and ordered dissolution thereof from that date. An Advocate was ordered to be appointed as Commissioner to take accounts of the partnership firm for the period between 5th February 1971 to 20th June 1972. Accordingly a preliminary decree was passed by the learned trial Judge. The learned trial Judge held that the Respondent has failed to establish that Plot No.494 at Pimpri was the property of the partnership firm. The learned trial Judge held that the Respondent has failed to prove that

the award made by the Arbitrators was not binding on him. The learned trial Judge held that the Appellants have established that the Respondent is estopped from claiming any relief regarding the transaction covered by the Award. Therefore, the claim for accounts made by the Respondent was decreed only for the period between 5th February 1971 to 20th June 1972.

5. The decree passed by the learned trial Judge was challenged by the Respondents i.e. the legal representatives of the original Plaintiff. The Appellants filed cross-objections for challenging the decree passed by the trial Court. By Judgment and Decree dated 16th April 1985, the learned 8th Addl. District Judge, Pune, partly allowed the appeal and substituted the decree passed by the trial Court. The Appellate Court granted a decree declaring that the arbitration proceedings and consequent award was illegal under section 30 of the Arbitration Act and was not binding on the Respondent. The Appellate Court directed the accounts to be taken for the period from 1st April 1966 to 20th June 1972 and declared that the firm shall be deemed to be dissolved from 20th June 1972. Being aggrieved and dissatisfied by the decree passed by the Appellate Court, the Appellants/Defendants have preferred this Second Appeal. The Second Appeal No.136

of 1987 was preferred by the Respondents for challenging the same Judgment and Decree. The Second Appeal No.136 of 1987 was dismissed for default by order dated 23rd June 2004 after giving several opportunities to the Appellants in the Second Appeal. The Respondents/Plaintiffs were represented by the same Advocate in both the Second Appeals. Subsequent to the dismissal of the Second Appeal No.136 of 1987, the Advocate for the Respondents appeared in the present Second Appeal on various dates. However, no application has been made for restoration of the said Second Appeal No.136 of 1987.

6. Shri Satpute, the learned Counsel appearing for the Appellants, relied upon section 32 of the Arbitration Act, 1940 (hereinafter referred to as "the said Act of 1940") and submitted that no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award nor shall any award be enforced, set aside, amended, modified or in any way affected otherwise than as provided by the Act. He submitted that though the Award is not filed as required by section 14 of the said Act 1940 and though it is not made rule of the Court, at the highest it will be called as an award which is not enforceable. He submitted that section 32 will apply to

such an Award. He relied upon the decisions of this Court to which reference will be made at a later stage. He submitted that even if the Decree for dissolution is passed, the Award will be affected and therefore, bar under section 32 will clearly apply. He, therefore, submitted that the suit itself was not maintainable in view of the bar created by section 32 of the said Act of 1940. He submitted that the original Plaintiff after receiving the sum of Rs.12,000/- which was paid to him in accordance with the Award, was estopped from challenging the Award in any manner. He submitted that the suit was not maintainable on the cause of action as pleaded by the Respondents.

7. The learned Counsel appearing for the Respondents submitted that the Award is not an award within the meaning of the said Act of 1940 and the said Award became a nullity as it was not filed in the Court and the Decree in terms of the Award was not passed. By placing reliance on the provisions of the Arbitration and Conciliation Act, 1996, it is submitted that in the said Act of 1996, the Award become enforceable as decree of the Civil Court without the same being filed in the Court and without the same being made rule of the Court. He submitted that the provisions of the said Act of 1940 are totally different and the award is not enforceable

unless it is made a rule of the Court and therefore, the suit was maintainable in the Civil Court. He submitted that the Appellants have not placed on record the terms of reference of the alleged arbitration. He submitted that unless the terms of reference are placed on record, it is not possible to come to the conclusion that the Award will be affected by decision in the suit.

8. In reply to the submissions made by the learned Counsel appearing for the Respondents, Shri Satpute learned Counsel for the Appellants submitted that whether the Award is filed in the Court or not is of no consequence in view of the law laid down by this Court. He submitted that admittedly the Respondent Thakurdas received a sum of Rs.12,000/- on the basis of the Award.

9. I have carefully considered the submissions made by the learned Counsel appearing for the parties. It will be necessary in this behalf to make a reference to the decision of this Court relied upon by the learned Counsel appearing for the Appellants. The first decision is a case reported in AIR 1953, Bombay, page 386 (Narbadabai & ors. v/s.Natverlal Chunilal Bhalakia & anr.). A Division Bench of this Court while deciding the said case considered scope of the bar created by section 32 of the said Act of 1940. This Court held

that the expression "effect of the Award" is wide enough to cover a suit to enforce the Award. This Court held that although a party may not in terms ask for a direction of the Court to give effect to the award, the fact that he asks the Court to enforce the award must result in the Court giving a decision upon its effect and therefore such a suit is not maintainable. In another judgment of this Court reported in AIR 1979 Bombay page 149,(M/s.Delux Silk Traders v/s. M/s.Satyanarayan Mahendrakumar & ors.) the learned Single Judge of this Court considered the question whether the provisions of section 32 creating bar to the suit will be attracted in case of an award which is unenforceable as a result of failure to file the same in the Court. Relying upon the Judgment of the Apex Court reported in AIR 1970 SC 833 (Satish Kumar & ors. v/s.Surinder Kumar & ors.), the learned Single Judge held that although an award may be unenforceable because no decree has been passed in terms of it, nevertheless it would be binding on the parties and no suit can be filed in respect of the subject matter of the Award. In view of this Judgment of the learned Single Judge of this Court, contention raised by the Counsel appearing for the Respondents that the bar of section 32 will not be attracted as a result of the award being unenforceable will have to be rejected.

10. The said Act of 1940 appears to be a complete Code in itself. Section 30 of the said Act of 1940 makes available the remedy of making an application for setting aside an Award. One of the grounds on which the Award can be set aside is that the Award has been improperly procured or is otherwise invalid. Section 32 clearly bars a suit which will have the result of setting aside the award or which will have the effect of affecting the award in any manner. The learned Addl.District Judge has granted declaration that the award dated 16th February 1971 is illegal under section 30 of the said Act of 1940. On a plain reading of section 32 of the said Act of 1940 it is clear that a declaration as regards the illegality of the award could not have been granted in a suit filed by the Respondents. The learned Addl. District Judge has purportedly invoked section 30 of the said Act of 1940. Under this section an application for setting aside the Award can be granted only on the grounds which are set out in the said section. The Application is subject to specific period of limitation provided in Article 119 of the Limitation Act, 1963, and against such an order passed on Application under section 30 of the said Act of 1940, an appeal from order is provided under section 39 of the said Act of 1940. The learned Addl. District

Judge could not have exercised the power under section 30 of setting aside the award in a Civil Suit filed by the Respondents. In any event the declaration granted by the learned Addl. District Judge certainly affects the award as the same will have the effect of setting aside the Award. Therefore, in my view the learned Addl.District Judge could not have granted any declaration as regards the illegality of the said Award and therefore, declaration granted and consequently the direction given for taking accounts from 1st April 1966 to 4th February 1971 will have to be quashed and set aside.

11. The second question which is required to be decided is whether the decree passed by the trial Court is in contravention of the section 32 of the said Act of 1940. The learned trial Judge has extensively referred to the award made by the Arbitrators. The learned trial Judge held that the Respondent was estopped from challenging the said award. For the purpose of determining whether the order passed by the trial Court is inconsistent with the Award or not or whether it will affect the award, it will be necessary to refer to the partnership deed as well as the award itself. Clause 5 of the deed of partnership clearly provides that the partnership shall be at Will. On a plain reading of the agreement dated

25th February 1967, Exh.281, it is clear that the same does not refer to any clauses in the deed of partnership. The Award purportedly made by the Arbitrators is in two parts. The first part is at Exh.277. The bar of section 32 was pleaded by the Appellant and therefore, it was for the Appellant to place on record the terms of reference before the Arbitrators. However, the terms of reference are not placed on record. Therefore, the scope of proceedings before the Arbitrators and the award made by the Arbitrators will have to be understood from the Award itself. The Award records that the Appellant No.1 shall pay Rs.12,000/- to the Respondents in connection with the accounts from the date of start of the firm upto 5th February 1971. It further records that the Respondents will have no concern to see or check the accounts from the date of start of the Cinema theatre upto 5th February 1971. It is held that the Appellant No.1 will be responsible for all the liabilities, debts etc. from the date of start of the Cinema theatre upto 5th February 1971. The Award further records that from 5th February 1971 the Cinema theatre had been given on lease and all the partners will have to make a fresh agreement. It further provides for distribution of the lease amount in terms of the shares and for sharing the expenditure. It specifically records that after taking

the expenses shown on the reverse the net profit will be shared in accordance with the agreement arrived at between the parties. A reference will also have to be made to the second part of the Award which is at Exh.278. It is issued in continuation of the earlier award at Exh.277. Exh.278 records that from 5th February 1971 till continuation of the lease agreement in respect of the theatre, a sum of Rs.750/- per month shall be paid to the Respondents irrespective of the amount of profit or loss incurred during the said period of the lease agreement. On expiry of the said lease agreement, the Respondents will continue to receive their due share as per the deed of partnership dated 9th December 1966. A plain reading of both the documents shows that the partnership firm and the business conducted continued exist even after the said award. In fact the said Award specifically provides that the partners will act on the terms incorporated in the deed of partnership. The effect of the Award is that the accounts upto 5th February 1971 are finally settled between the parties and the ratio of sharing profit received from the amount of lease of theatre is determined between the parties. Therefore, the arbitration has nothing to do with the subsequent dissolution of the firm made by the Respondent. As pointed out earlier in the plaint the Respondent has

relied upon the notice dated 13th June 1972 by which the partnership which was at will was dissolved. Therefore, the present suit is based on a cause of action which arose as a result of dissolution of the firm by one of the partners subsequent to the award being made. As stated earlier, the award continues the earlier partnership. In so far as payment of sum of Rs.12,000/- to the Respondent Thakurdas is concerned, the receipt issued by the Respondent, which is at Exh.276, clearly shows that he has received the said amount in full and final settlement of his share in the accounts upto 4th February 1971. In this connection it will be necessary to refer to the operative part of the decree of the trial Court, which reads as under:

> . "It is hereby declared that the partnership M/s, Cinema Deluxe Pimpri shall be deemed to have been dissolved from 20.6.1972 and it is ordered that the dissolution thereof from that day be advertised in the gazette and it is further ordered that Shri K.P.Kothadiya, Advocate, is appointed as Commissioner to take the accounts of the partnership firm for the period 5.2.1971 till 20.6.1972 from the Defendants and the Commissioner is further directed to report result of the said

accounts to the Court on or before 1.4.1984.

. The shares of the parties are as per the terms mentioned in the original partnership deed Exh.242.

. The plaintiffs claim regarding permanent injunction and the appointment of receiver stands dismissed.

. The plaintiff to pay 1/2 costs of the suit to the defendants.

. Draw preliminary decree accordingly."

The Award made by the Arbitrators settled the issue of accounts only upto 4th February 1997. The Award only provides for mode of sharing the income received from the lease of theatre. Except for payment of the sum of Rs.750/- per month to the Respondent Thakurdas, the Award specifically provides that the profit shall be distributed between the partners as per the proportion fixed by the deed of partnership. The learned trial Judge has directed the accounts to be taken only for the period from 5th February 1971 till 20th June 1972 i.e. the date of dissolution of partnership. The said period does not cover the period which is covered by the Award. On the basis of the notice of dissolution, the learned trial Judge has directed that the partnership shall be deemed to have been dissolved from 20th June 1972. The

learned trial Judge accepted that the partnership was at Will and notice of dissolution was given as contemplated by section 43 of the Indian Partnership Act, 1932. Therefore, no part of the decree passed by the trial Court is inconsistent with the Award. The decree passed by the trial Court does not affect the validity of the arbitration agreement between the parties and the award made by the Arbitrators. In so far as sharing of income from the theatre during the subsistence of the lease is concerned, the Award contains a specific direction and the trial Court has held that the award is binding on the parties. Therefore the Commissioner appointed for taking accounts will have to naturally consider the effect of the Award which is binding between the parties.

12. The prayer made in the suit for account is not restricted to the period prior to 5th February 1971. If the prayers made in the plaint are perused, it cannot be said that all the prayers are hit by section 32 of the said Act of 1940. The learned trial Judge has moulded the reliefs while passing the Decree with a view to ensure that the Award made by the Arbitrators remains unaffected and continues to remain binding on the parties.

11. In the circumstances, the decree passed by the Appellate Court will have to be set aside and the Decree of the trial Court will have to be restored.

12. Hence the following order:

(i) The Second Appeal is partly allowed with no order as to costs.

(ii) The Judgment and Decree dated 16th April 1985 passed by the Appellate Court is quashed and set aside and the Judgment and Decree of the trial Court dated 16th February 1984 is restored.

(iii) Certified copy expedited.

Judge.